United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-2089 2094

To be Argued By:
JAY TOPKIS

United States Court of Appeals

For the Second Circuit

B

P/S

BRIAN S. FIELDING,

Petitioner-Appellant-Appellee,

-against-

EUGENE LE FEVRE, Superintendent of Green Haven Correctional Facility, BENJAMIN WARD, Commissioner of the Department of Correctional Services of the State of New York, and LOUIS LEFKOWITZ, Attorney General of the State of New York,

Respondents-Appellees-Appellants.

On Appeal from the United States District Court

For the Southern District of New York

BRIEF FOR PETITIONER-APPELLANT-APPELLEE
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APPELLANT'S BRIEF

Statement of Issues

Brian Fielding, petitioner in this habeas corpus proceeding, suffers from a curable emotional illness known to medicine as "pedophilia" -- a sexual attraction for the young. Fielding comes to this Court convicted in the Westchester County Court of criminal offenses arising out of his condition. Thirty years old and a first offender, Fielding has begun serving a sentence of up to seven years

in a jail which lacks any facilities to treat his illness. While imprisoned, his progress toward cure is being irretrievably reversed. And while he is incarcerated, Fielding lives daily with the near certainty of physical abuse at the hands of other inmates.

Fielding was sentenced in the state court by a judge (Hon. John J. Clyne) who promised Fielding imprisonment the day the judge first played a role in the case -- before a single fact relating to Fielding's condition, or the sentence appropriate in light of that condition, was even submitted. Moreover, on his very first day on the case, Judge Clyne sought to coerce a guilty plea. The District Court (Metzner, J.) ruled that Judge Clyne's conduct "may" have violated Fielding's Sixth Amendment rights.

Before sentencing, Judge Clyne dismissed as "jargon" the undisputed expert analyses of six qualified physicians, each of whom stated flatly that jail would leave Fielding an incurable recidivist, at best. And confronted with Fielding's possible suicide if imprisoned, Judge Clyne replied that "maybe it would be for the best." He then sentenced Fielding to two consecutive indeterminate maximum sentences, totalling 14 years, a sentence the State Appellate Division felt compelled to reduce to concurrent seven-year terms "in the interest of justice."

In these circumstances, the issues presented are:

1. Does the record support the District Court's finding that the state trial judge may have violated Fielding's Sixth Amendment right to trial?

2. After the District Court found that the state trial judge may have violated Fielding's Sixth Amendment rights, was the relief ordered -- a remand to the same judge to have him decide if he had violated Fielding's constitutional rights -- adequate?

3. Were Fielding's Eighth Amendment rights violated when he was sentenced to up to seven years imprisonment for offenses arising out of an emotional illness, when the undisputed facts show that (a) Fielding can be treated successfully outside prison; (b) Fielding will go untreated in prison and, hence, will almost certainly become permanently ill if he is incarcerated; and (c) by reason of his illness, Fielding is threatened with physical abuse and possibly even death while he is incarcerated?

Statement of Facts

Fielding's Indictment and Conviction

Fielding was indicted in the Westchester County Court on March 15, 1974. The indictment charged numerous counts of violation of New York state sodomy and sex-offense statutes. (135a; 149a*) The case proceeded in the normal course until the morning of October 15, 1974, when the parties appeared in court on the state's motion for a preference. Then, the parties were advised in court that the Appellate Division, Second Judicial Department, had appointed the Hon. John J. Clyne, County Judge of Albany County, to preside over Fielding's trial. (136a)

At a conference which took place immediately thereafter in the robing room, Judge Clyne asked if the case could be disposed of through plea negotiations. (138a) The case was then at such a preliminary stage that the Assistant District Attorney had not even discussed a plea with his superiors. (Id.) However, as the contemporaneous affidavit

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* The joint appendix on this appeal has been paginated by using consecutive numbers, followed by a lower case "a". Unfortunately, much of the appendix consists of papers forming part of the record in state court proceedings, which had previously been paginated with a capital "A", followed by a number. We call this to the Court's attention in the hope of minimizing confusion.

of Vincent Lanna, Esq., Fielding's trial counsel, states:

> "Judge Clyne informed your deponent, that even if there were a disposition by way of plea negotiations, that the defendant herein would be incarcerated. Judge Clyne also informed your deponent, that should any plea negotiation be rejected, and that the defendant go to trial and be found guilty, that the sentence might be more severe." (Id.)

Judge Metzner ruled that these statements by Judge Clyne -- undisputed before the District Court -- established a possible violation of Fielding's Sixth Amendment rights because they gave rise to an inference that, in pronouncing sentence, Judge Clyne may have taken into account the fact that Fielding stood trial. (38a-40a)

A jury having been waived, trial commenced before Judge Clyne on November 19, 1974. On November 21, the court found Fielding guilty of seven felony and seven misdemeanor counts, in violation of New York Penal Law §§ 130.45, 130.60 and 260.10. (16a; 33a) All the offenses arose out of sex acts between Fielding and adolescent boys who were members of a football team which he coached. (19a)

On January 2, 1975, Judge Clyne sentenced Fielding to two consecutive indeterminate sentences of up to seven years each -- a total of up to fourteen years in jail. (6a)

The court specified that the sentence be served at Green Haven prison, a maximum security institution. (15a-16a) To understand the extraordinary harshness of this sentence, it is necessary to sketch the undisputed medical evidence before Judge Clyne at the time he pronounced sentence.

Fielding's Examinations

After his arrest, Fielding submitted to comprehensive psychiatric examinations by six physicians. Each submitted a thorough report to Judge Clyne in connection with Fielding's sentence. (45a, 56a, 64a, 80a, 97a, 114a) These reports, prepared independently, showed that Fielding suffers from a treatable and curable emotional illness called pedophilia.

Typical of the experts is Dr. Henry C. Weinstein, a psychiatrist and lawyer, who is on the faculties of both the N.Y.U. Medical Center and the N.Y.U. Law School. He also is Director of Forensic Psychiatry Services at the Bellevue Hospital Center, where he is in charge of the Psychiatric Prison Ward. Dr. Weinstein has had experience with cases similar to that of Fielding. (115a, 118a)

Dr. Weinsten is scarcely defendant-oriented; rather he advised Judge Clyne of his "strict view of and grave

concern with those aspects of the criminal justice system which relate to the protection of the community" and his awareness of "the urgent need for society to protect itself by the incarceration of dangerous and/or violent habitual criminals." (116a) Yet, after examining Fielding, Dr. Weinstein concluded:

> "In my opinion, the prognosis for Brian's complete recovery is very high. Under the present circumstances, there is virtually no chance that he would be involved again in behavior dangerous to the community.
>
> * * *
>
> ". . . I am also concerned that incarceration in a jail would constitute a real and present danger to Brian's physical as well as mental well being. Having direct medical responsibility for a prison, I am very much aware of the physical dangers to a defendant such as Brian. The dangers of assaults and sexual attacks by the worst elements -- the truly psychopathic criminals -- are ever present. The effects on Brian would be devastating. Not only would any progress be halted, but the chances, under those circumstances, are good that he would regress, perhaps become fixed in a homosexual orientation, and further might very well become more depressed and suicidal. I myself have seen a number of cases such as this." (117a, 118a)

Dr. Sheldon G. Gaylin, Director of Psychiatry at Grasslands Hospital, Valhalla, New York (a Westchester County institution), reached the same conclusion. (60a) He stated that:

> "For Mr. Fielding to be incarcerated for any period of time would be a true tragedy in many ways. One, is that treatment which apparently has been quite successful, would be interrupted and probably totally negated. In addition, I know of no prison facility which can offer the kind of therapy that Mr. Fielding needs. Secondly, it would interrupt his ability to develop a normal social and sexual and family relationship which is absolutely essential to the well being of this young man.
>
> "Thirdly, the kind of behavior which brought this man to court would make any jail sentence extremely dangerous to him physically. I know of no jail or penitentiary in which he could be protected from abuse from fellow prisoners unless he were kept in solitary confinement. In discussions with local corrections officials, they indicate that even solitary confinement must be broken periodically and the chances of his being seriously hurt are great. Even if some way could be found to protect him, the constant anxiety related to the fear of personal attack would be a constantly present and overwhelming burden. These anxieties plus long periods of isolation could lead to serious depressions, and the potential for self destructive behavior." (59a)

Dr. Gaylin's report must be given the highest respect: he is the physician to whom the Westchester County courts most often refer persons for psychiatric examination. (22a)

Fielding also was examined by Dr. Robert L. Sadoff, Professor of Psychiatry at the University of Pennsylvania School of Medicine. Dr. Sadoff, one of the country's leading forensic psychiatrists and an expert on the penal aspects of sexual offenses, has worked with groups of pedophiliac inmates

in prison. (102a, 103a-104a) He concluded that:

> "To take [Fielding] out of his current situation and to place him in prison would be disastrous for several reasons:
>
> 1. Brian needs the treatment he is getting if he is to continue to be productive and contribute to society and not regress to his former level of activity.
>
> 2. Incarceration would undoubtedly cause such a regression in him and would undo much of the good that has occurred over the past fourteen months for him.
>
> 3. The real danger for a person convicted of this type of behavior in our prison system is evident to all who know anything about prisons. These men are harrassed [sic], beaten and literally destroyed unless very special isolation methods are used to protect them from other inmates." (101a)

In summary, the reports all agreed with Dr. Gaylin that Fielding's prognosis was "excellent" (58a), and that his behavior would not be repeated in the future. (50a, 70a, 87a-89a, 101a-102a, 117a) Dr. Zales, the psychiatrist who had treated Fielding since October 1973, after his arrest (46a), advised Judge Clyne that he poses "absolutely no threat to the community at this time. . . ." (50a)

The reports also demonstrated -- again with unanimity -- that, if Fielding were incarcerated, the gains he had made would be wiped out; permanent damage leading to recidivism would be inevitable. (59a, 65a-66a, 87a-88a,

101a-102a, 118a) Worse, Dr. Zales reported that after Fielding was incarcerated for ten days following conviction, he developed a "marked suicidal potential" -- a diagnosis concurred in by the prison physician. (50a-51a) The other examining psychiatrists agreed: imprisonment might well lead to Fielding's death. (59a, 88a, 101a, 118a)

In addition, the experts pointed out that prisoners like Fielding are on the lowest rung of the prison hierarchy, and are despised and abused by the other prisoners. In jail, Fielding will be "harassed, beaten, and literally destroyed." (101a; see also 59a, 118a) The only alternative is isolation, a medicine as bad as the disease, for it too will inevitably worsen Fielding's condition. (59a; 101a) Nor is isolation realistic for the entire seven years of Fielding's sentence.

Such was the undisputed evidence presented to Judge Clyne on the issue of incarceration. This evidence appears to have been confirmed by the pre-sentence report on Fielding, prepared pursuant to New York Criminal Procedure Law § 390.20(1). Judge Clyne refused to release the report, but he admitted that there "was nothing in the pre-sentence report in this matter that was divergent from defendant's pre-sentence memorandum." (Ex. D, p. 2 to Petition for Writ of Habeas Corpus).

Judge Clyne rejected this evidence out of hand. His attitude is shown by comments he made in a meeting with Fielding's friend, Anne Vitale, on December 30, 1974. (143a-145a) According to Ms. Vitale, Judge Clyne said that the psychiatrists' reports were nothing but "jargon." (144a) Ms. Vitale asked if Fielding could receive therapy in prison. Judge Clyne said "he did not know." (145a) She asked if the judge knew how important therapy was for Fielding. The judge said "he did not think it was important." (Id.) Ms. Vitale told the judge that prison might cause Fielding's suicide. Judge Clyne said "maybe it would be for the best."* (Id.)

Three days later, Judge Clyne ordered Fielding jailed for up to fourteen years.

Commencement of This Proceeding and Judge Metzner's Decision

On November 17, 1975, the Appellate Division affirmed Fielding's conviction, but reduced the maximum sentence to seven years by ordering all sentences to run concurrently. (8a) On May 13, 1976, the New York Court of Appeals affirmed both conviction and sentence, as modified. (17a)

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* Although Respondents did not offer any evidence in the District Court contradicting Ms. Vitale's affidavit, Judge Clyne now maintains that statements such as these were "taken out of context." (163a)

Three weeks later, on June 8, 1976, Fielding commenced this proceeding and a hearing was held on June 18. (3a)

The District Court gave respondents an opportunity to submit evidence controverting the medical reports on which Fielding relied; none was offered.

On July 16, Judge Metzner filed his decision. (30a) Dismissing Fielding's claim that it was cruel and unusual punishment to sentence him up to seven years in a prison where he could not be cured, would be injured irretrievably, and would be in danger of his life, Judge Metzner stated:

> "It is possible that a habeas writ could issue if it is shown that prison conditions in the entire state are such that incarcerating Fielding could constitute cruel and unusual punishment. See, e.g., James v. Wallace, 382 F. Supp. 1177 (M.D. Ala. 1974). However, there are no such proofs before the court in this petition, and the court may not speculate as to the efficacy of the state's control of its penal system." (36a-37a)

The court appears to have misread the evidence, for the undisputed documentary proof before it showed exactly what the court would have deemed sufficient as a matter of law -- that, in the words of Dr. Gaylin, New York has "no jail or penitentiary in which [Fielding] could be protected from abuse from fellow prisoners. . . ." (59a) (See Point III, infra)

On the Sixth Amendment claim, however, Judge Metzner found a possible constitutional violation:

> "[T]he severity of the sentence could have been based in part on the fact that petitioner stood trial. Judge Clyne omitted any reference to such a statement in his affidavit. Under the facts here, there is enough to infer that such an improper basis for sentence may have existed. Accordingly, the court will grant petitioner's motion on the above stated ground only, and will remand the matter to Judge Clyne for further proceedings." (40a; emphasis is in original)

Judge Metzner then directed the following relief:

> "If, after an objective evaluation, the judge should find that his sentence was motivated by such an improper consideration, he shall set the sentence aside and resentence petitioner. Should he conclude that he did not penalize petitioner for his insistence on trial, he shall file an appropriate order to that effect. (Id.)*

On July 26, Fielding served a notice of motion to reargue. (42a) Fielding claimed that the relief afforded was inappropriate and that, instead, the court should have vacated his sentence and remanded for resentencing. (Auspitz Aff't** ¶ 8). On August 6, Judge Metzner denied reargument, but issued a certificate of probable cause. (44a) This

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* Respondents have cross-appealed from this portion of the District Court's order.

** Refers to affidavit of Jack C. Auspitz, sworn to August 9, 1976, submitted in support of Fielding's stay motion and on file with this Court.

appeal was filed the next business day, August 9.

On August 11, Judge Clyne conducted a unique proceeding. (156a) Playing the roles of witness and judge, he sat in judgment upon himself. Acting pursuant to his purported understanding of Judge Metzner's order, he concluded -- not surprisingly -- that "[a]t no time was I ever motivated by any vindictiveness toward this Defendant," (169a) and that "in no manner was my sentence in any way predicated upon the fact that this Defendant went to trial." (173a)

Significantly, Judge Clyne's version of the facts differed in at least one material respect from the facts which had been before the District Court and which respondents had not then attempted to contradict. (See p. 17, fn., infra)*

Thereafter, on August 17, this Court denied Fielding's motion to stay execution of his sentence pending determination of this appeal. (Order, signed August 17, 1976) As a result, the State ordered Fielding's surrender, which occurred on August 19.

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* The transcript of the remand, of course, was not before the District Court. Respondents, however, submitted it to this Court in opposition to Fielding's stay motion. (See Supplemental Affidavit of B. Anthony Morosco, sworn to August 16, 1976, submitted in opposition to Fielding's stay motion and on file with this Court.) It thus now is before this Court and, for the Court's convenience, has been included in the joint appendix. (156a)

* * *

For the reasons set forth below, we respectfully submit that there was a clear Sixth Amendment violation here. Moreover, the District Court, having found a possible Sixth Amendment violation, had, we submit, only two appropriate alternatives: either vacate the sentence imposed and order resentencing, or resolve by evidentiary hearing whether Fielding's Sixth Amendment rights were in fact violated. The relief awarded -- a remand to Judge Clyne -- was unprecedented in this Circuit, against the weight of authority, and imposed an impossible task on Judge Clyne.

Further, on the evidence submitted, the District Court erred in summarily dismissing Fielding's Eighth Amendment claim.

ARGUMENT

POINT I

FIELDING'S SIXTH AMENDMENT RIGHTS WERE VIOLATED

In the District Court, we demonstrated that Judge Clyne, on his very first day on this case, told Fielding's counsel, Mr. Lanna, that he intended to jail Fielding if he

pleaded guilty, and then said that his sentence "might be more severe" if Fielding exercised his constitutional right to stand trial. (138a)

Judge Clyne never denied these facts in the District Court. Indeed, for the most part, he corroborated them. In an affidavit submitted in state proceedings, which was before Judge Metzner, Judge Clyne admitted that it was he who first broached the subject of plea bargaining and told Mr. Lanna that he then intended "to incarcerate the defendant in the event that he should enter a plea of guilty . . . ." (147a) Judge Clyne even went so far as to telephone the Westchester County District Attorney and "indicated to him that it would be appreciated if his office could make known their position to Mr. Lanna as quickly as possible." (Id.)

Respondents submitted no additional evidence in opposition to our claim that Judge Clyne's conduct violated Fielding's Sixth Amendment right to go to trial, free from the fear that he might be sentenced more harshly for having done so. There was no new affidavit by Judge Clyne, nor by William Fredericks, Esq., the Westchester County Assistant District Attorney, who also was present at this discussion.

On the record before it, the District Court found

a possible Sixth Amendment violation. This finding was, we respectfully submit, insufficient: the Sixth Amendment violation was glaring.*

The facts were not disputed. And the law is clear: a trial judge cannot create the appearance of seeking to coerce a guilty plea by threatening a criminal defendant with increased punishment if he exercises his right to stand trial.

In United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948 (1973), the Ninth Circuit condemned conduct similar to that in this case. There, the District Judge told the defendant that, if he pleaded guilty,

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* We emphasize that, in our view, the District Court erred as a matter of law on the facts before it. Mr. Lanna swore that Judge Clyne told him that if Fielding went to trial and was convicted, Fielding's sentence "might be more severe" than if he pleaded guilty. (138a) Subsequent to the District Court's decision, Judge Clyne, on remand, contradicted Mr. Lanna by stating:

> "I pointed out to Mr. Lanna at that time that things could possibly be worse, bearing in mind that if the Defendant were to plead to a single Felony, sentence would be imposed accordingly. . . .At no time was there any discussion about actual time or the threat of any possible sentence in the event of trial." (165a; see also 171a-172a)

Thus, a conflict of fact was created after Judge Metzner ruled. But a conflict of fact should be resolved by a hearing -- not by submission to Judge Clyne's ipse dixit.

he would receive the same three-year sentence imposed on a co-defendant, but that if he went to trial, he would receive a sentence of five to seven years. Stockwell exercised his constitutional right to trial and was convicted. Even though the seven years Stockwell then received was well within the statutory range of penalties, the Court of Appeals vacated the sentence and remanded for resentencing:

> "The chilling effect of such a practice upon standing trial would be as real as the chilling effect upon taking an appeal that arises when a defendant appeals, is reconvicted on remand, and receives a greater punishment. See North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969)." (472 F.2d at 1187).

In Stockwell, the trial court actually promised a harsher sentence after trial. Here, Judge Clyne only threatened one. But the threat is every bit as chilling as the promise.

The basic rule -- applicable to both situations -- is that the trial court must at all times take the most careful steps to protect the defendant's right to trial -- rather than to menace it. See Euziere v. United States, 249 F.2d 293 (10th Cir. 1957)(vacating guilty plea entered after court told defendant he would receive maximum sentence if convicted because he would have put government to expense of trial); United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y.

1963)(vacating guilty plea entered after court, in midst of trial, told defendant he would receive consecutive maximum sentences if convicted); Letters v. Commonwealth, 193 N.E.2d 578, 346 Mass. 403 (Mass. Sup. Jud. Ct. 1963)(vacating guilty pleas entered after court, in midst of trials, told defendants they would receive consecutive sentences if convicted, but concurrent terms if they pleaded guilty).

Similarly, time and time again, the courts have struck down sentences imposed after the trial judge took into account the fact that the defendant had exercised his constitutional rights. For example, the court may not base its sentence on the defendant's refusal, at sentencing, to admit his guilt. E.g., Poteet v. Fauver, 517 F.2d 393 (3rd Cir. 1975); United States v. Laca, 499 F.2d 922 (5th Cir. 1974); Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969); LeBlanc v. United States, 391 F.2d 916 (1st Cir. 1968); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966).*

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* See also United States v. Derrick, 519 F.2d 1 (6th Cir. 1975)(judge admonished defendant for putting government to expense of trial); United States v. Rodgers, 504 F.2d 1079 (5th Cir.), cert. denied, 422 U.S. 1042 (1974)(vacating sentence based in part on defendant's refusal to cooperate with authorities in bringing charges against others); United States v. Hess, 496 F.2d 936 (8th Cir. 1974)(judge may have based sentence on defendant's decision to stand trial and alleged perjury); United States v. Wiley, 278 F.2d 500 (7th Cir. 1970)(judge sentenced Wiley, who stood trial, to more severe sentence than co-defendants, who pleaded guilty, despite the fact that judge considered Wiley a minor participant in crime); Johnson v. State, 336 A.2d 113, 274 Md. 536 (Md. Ct. App. 1975)

fn. continued

Stockwell draws its concern with chilling the defendant's exercise of his Sixth Amendment right to trial directly from North Carolina v. Pearce, 395 U.S. 711 (1969). There, the Supreme Court held it unconstitutional to resentence a defendant to a harsher term after the defendant successfully appealed, unless the court on resentencing identified objective factors on which the harsher sentence was based. The Supreme Court has made it clear that an unconstitutional chilling effect on the right to appeal exists whenever "a potential for vindictiveness" is present. Blackledge v. Perry, 417 U.S. 21, 28 (1974)(vacating conviction on harsher offense, charged after defendant exercised his right to de novo review of conviction on lesser offense). See also North Carolina v. Pearce, supra, 395 U.S. at 725. There is no need to show that "actual retaliatory motivation must inevitably exist." Blackledge v. Perry, supra, 417 U.S. at 28.

(Continued)
(judge admonished defendant for refusing to plead guilty); People v. Moriarty, 185 N.E.2d 688, 25 Ill. 2d 585 (Ill. Sup. Ct. 1962)(judge admonished defendant for putting state to the expense of trial). But compare United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974), cert. denied, 423 U.S. 897 (1975)(sentence not per se invalid because trial judge took into account defendant's alleged perjury); United States v. Vermeulen, 436 F.2d 72 (2d Cir. 1970), cert. denied, 402 U.S. 911,(1971)(upholding sentence allegedly based in part on defendant's refusal to furnish information concerning others).

Accordingly, it was sufficient to demonstrate, as Fielding did, that a threat was made. For the Pearce-Stockwell rule is a prophylactic one, applicable regardless of whether the defendant succumbs to the threat. (Significantly, Stockwell himself was not coerced into pleading guilty, but exercised his right to trial). The rule is designed to preserve the impartiality of the court and to prevent the criminally accused from being improperly coerced into relinquishing his Sixth Amendment rights.

Here, Judge Clyne attempted to initiate plea bargaining and threatened a more severe jail sentence if Fielding stood trial. Manifestly, Judge Clyne's conduct "pose[d] a realistic likelihood of 'vindictiveness'." Blackledge v. Perry, supra, 417 U.S. at 27. This in itself established the Sixth Amendment violation.*

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* Indeed, the chilling effect of a harsher sentence here was emphasized by the fact that it was the trial court itself which initiated plea bargaining. Most recently, in United States v. Werker, 535 F.2d 198 (2d Cir. 1976), this Court recognized the dangers inherent whenever the trial judge becomes a participant in the plea bargaining process. Although, there, the Court was discussing Rule 11, Fed. R. Crim. P., the concerns expressed apply equally to state criminal proceedings:

> "The defendant may fear that rejection of the plea will mean imposition of a more severe sentence after trial or decrease his chances of obtaining a fair trial before a judge whom he has challenged.
>
> * * *

fn. continued

* * *

In United States ex rel. Chennault v. Smith, 366 F. Supp. 717 (E.D.N.Y. 1973), affirmed without opinion, 495 F.2d 1367 (2d Cir.), cert. denied sub nom., Smith, Correctional Superintendent v. Chennault, 419 U.S. 986 (1974), the court issued a habeas writ after finding that the petitioner was convicted on the basis of unlawfully seized evidence. There, the court wrote:

> "If this Court's independent review of the record presented by the State reveals a reasonable possibility that petitioner's conviction resulted from a violation of his federal constitutional rights, that conviction cannot stand." (366 F. Supp. at 721; emphasis added).

Here, the District Court found that "an improper basis for sentence may have existed." (40a; emphasis in original) There was, then, "a reasonable possibility" that Fielding's sentence was imposed in violation of his Sixth Amendment rights. Accordingly, that sentence "cannot stand."

(continued)

"[Q]uite apart from the sentencing process, the defendant may in fact be prejudiced or believe himself to be prejudiced if he does not plead guilty in response to the judge's proposed sentence. The defendant must view the judge as the individual who conducts the trial and whose rulings will affect what the jury is to consider in determining guilt or innocence. The defendant may therefore be reluctant to reject a proposition offered by one who wields such immediate power. Regardless of the judge's objectivity, it is the defendant's perception of the judge that will determine whether the defendant will feel coerced to enter a plea." (Id. at 202; emphasis added).

POINT II

THE RELIEF DIRECTED TO REDRESS THE SIXTH AMENDMENT VIOLATION WAS INAPPROPRIATE

On the record before the District Court, there was, we submit, a clear Sixth Amendment violation. The District Court, however, found only a possible Sixth Amendment violation. Having made this finding, the Court should at least have fashioned appropriate relief: it should either have held an evidentiary hearing to decide whether there was a Sixth Amendment violation, or it should have vacated the sentence outright and ordered resentencing.

The District Court did neither. Rather, it ordered an extraordinary form of relief, unprecedented in this Circuit so far as we know: the Court directed Judge Clyne to undertake an "objective evaluation" into his own motivation in sentencing Fielding, and to decide if he -- Judge Clyne -- had violated Fielding's Sixth Amendment rights. (40a)

This, we submit, was error. In asking Judge Clyne to determine whether he personally was improperly motivated, the District Court imposed on Judge Clyne an impossible burden -- he was asked to undertake self-psychoanalysis, to perform "a mental gymnastic which is beyond not only [his] power but anybody's else." Nash v. United States, 54 F.2d

1006, 1007 (2d Cir.) (L. Hand, J.), cert. denied, 285 U.S. 556 (1932). The relief also made Judge Clyne literally the judge in his own cause -- a result abhorrent to our system of justice. Cf. Mayberry v. Pennsylvania, 400 U.S. 455 (1971)(due process bars trial judge from determining contempt charges).

The District Court, we submit, should have resolved the Sixth Amendment issue itself. To hold otherwise on the facts of this case would sanction a patent denial of fundamental fairness.

In the District Court, we showed that Judge Clyne threatened Fielding with a harsher sentence by telling his counsel, Mr. Lanna, that the sentence "might be more severe" if Fielding stood trial. (138a) In state court proceedings, Judge Clyne responded by affidavit to certain claims by Mr. Lanna. (146a) Conspiciously absent from that affidavit was any mention of a threat of a harsher sentence. Respondents nevertheless submitted no new evidence to the District Court to controvert Fielding's claim; when Judge Metzner inquired whether there were any factual matters in dispute, respondents stood mute. (Transcript of argument before the District Court, held June 18, 1976, p. 20).

Relying specifically on Judge Clyne's failure to address Mr. Lanna's statement, Judge Metzner thereafter ruled

that Fielding may have been sentenced for exercising his right to trial. (40a) Then, however, he ordered a "hearing" that respondents never even asked for -- and not a hearing before an impartial tribunal where Fielding could cross-examine and present his side of the case. Instead, Judge Metzner directed a remand to Judge Clyne -- the very person whose conduct was in question -- thereby allowing Judge Clyne to fill in the gap in the record before the District Court.

Not surprisingly, Judge Clyne now has denied the critical portion of Mr. Lanna's affidavit: on remand he said that he only "pointed out to Mr. Lanna at that time that things could possibly be worse" (165a), but apparently maintains that he never said that the sentence "might be more severe." (See 171a-172a)

This kind of procedure is indefensible. If there was any fact issue in the District Court concerning Fielding's Sixth Amendment claim -- and there certainly now is one before this Court -- then, with all respect, the District Court itself should have resolved that issue by holding an evidentiary hearing, not by delegating its responsibility as fact finder to Judge Clyne.

Hess v. United States, supra, is the only other case we have found where the court directed relief similar to that

ordered by the District Court here.* Such relief, dubious at best in that case, certainly made no sense in this one. In Hess, 17 years had passed from sentencing to habeas corpus -- a time period which the Eighth Circuit described as of "some significance." (496 F.2d at 940). This period was significant for this reason: in the interim, a number of court decisions (cited at 496 F.2d at 938, 939) had been handed down which articulated the factors that a sentencing judge could, and could not, constitutionally consider. In essence, Hess' constitutional rights had been violated because the District Court had failed to anticipate these later decisions. And the Court of Appeals directed the District Court to reconsider its sentence in light of the standards which had emerged since sentencing.

The situation here was entirely different. Fielding contended that his Sixth Amendment rights were violated not because Judge Clyne failed to anticipate emerging constitutional standards, but because he failed to apply an existing one -- the prohibition against chilling the exercise of the Sixth Amendment right to trial.

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* In each of the cases in which the trial court threatened the defendant with increased punishment if he did not plead guilty or admit guilt after conviction (pp. 17-19, supra), the reviewing court vacated the sentence and remanded for resentencing. Similarly, in each of the cases where the trial court took into account impermissible factors (p. 19, fn., supra), the reviewing court vacated the sentence. These courts thus all resolved the Sixth Amendment issue in favor of the defendant and avoided the problems inherent in ordering the trial judge to try to examine his own motivation in sentencing.

The relief in this proceeding should, accordingly, have been different from that in Hess. It is one thing to direct that the sentencing judge determine if, in sentencing, he took into account factors subsequently held impermissible -- which is what happened in Hess. It is quite another to ask that the sentencing judge examine his own motivations, and either rationalize his prior sentence or publicly confess to a Sixth Amendment violation -- which was what Judge Clyne was asked to do.

The 17 year period in Hess was significant for another reason: if ever a judge could dispassionately evaluate the propriety of one of his own sentences, it would be years later -- when the event has long since been crowded from memory; when the person reviewing the event is, in a very real sense, a different person simply by virtue of the passage of time. That time to gain perspective simply had not occurred here.

Finally, it is clear that the court in Hess, and the District Court here, really just adopted the relief designed specifically for the North Carolina v. Pearce, supra, situation -- where the concern is chilling the right to appeal -- and applied it to a fact situation for which it is entirely inappropriate. In "Pearce-type" cases, where resentencing takes place after an appeal, the court, on resentencing, must

identify "objective information" justifying a more severe sentence. This, however, is easily done, for the resentencing judge is imposing sentence at a period after the initial sentence is imposed. Events in the interim -- for example, the defendant's conviction on other charges -- may justify a more severe sentence after appeal. (See 395 U.S. at 723, 726)

That situation, however, does not exist where -- as here -- the only sentence imposed may have been based on unconstitutional considerations, and motivation, not objective events, is the determining factor. This would seem to explain why no other court has ordered "Pearce-type" relief in circumstances similar to those in this case.

* * *

Accordingly, we submit that the District Court erred in ordering a remand to Judge Clyne. Fielding's sentence should be vacated and the matter remanded for resentencing. Alternatively, this Court should direct a prompt evidentiary hearing on Fielding's Sixth Amendment claim.

POINT III

THE SENTENCE IMPOSED UPON FIELDING IS CRUEL AND UNUSUAL PUNISHMENT

In the District Court, we argued that the sentence imposed on Fielding violated the Eighth Amendment's prohibition against cruel and unusual punishment. Again, respondents submitted no evidence to the District Court in opposition.* Accordingly, the following facts are undisputed:

1) Fielding suffers from a medically identifiable emotional illness -- pedophilia -- which is both treatable and curable. Fielding, at least until his surrender, had made significant progress toward cure. (50a, 58a-59a, 70a, 86a-88a, 101a-102a, 117a-118a, 134a)

2) There is no correctional institution in the State of New York with the facilities either to treat Fielding or to ensure his physical safety. (59a, 65a-66a, 87a-88a, 89a, 101a, 118a)

3) In prison, without continued treatment, Fielding

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* At oral argument, respondents merely "[took] the view that the prisons of New York are capable. . . . of keeping people in state custody." (Transcript of argument before District Court, held June 18, 1976, p. 20).

is sure to regress. He will probably become permanently fixed in a homosexual orientation, and may become so depressed that suicide is a distinct possibility. (50a-51a, 59a, 87a-88a, 89a, 101a, 118a, 134a)

4) Fielding is not a danger to the community. (50a, 58a, 70a, 117a, 134a)

In these circumstances, Fielding's sentence was not the maximum seven years that the statute permitted, but in fact "punishment" for life. It is, we submit, cruel and unusual punishment to take a sick person, withdraw treatment from him, and incarcerate him in a facility where he can only get worse, and may die.

The District Court rejected this claim on the facts, although conceding the legal merit of Fielding's claim. Thus, Judge Metzner wrote:

> "It is possible that a habeas writ could issue if it is shown that prison conditions in the entire state are such that incarcerating Fielding could constitute cruel and unusual punishment. See, e.g., James v. Wallace, 382 F. Supp. 1177 (M.D. Ala. 1974)." (36a-37a)

But, he went on to conclude:

> "However, there are no such proofs before the court in this petition, and the court may not speculate as to the efficacy of the state's control of its penal system." (37a)

This conclusion ignored the record.* The experts stated -- without contradiction -- that Fielding would be permanently and physically harmed in prison. Dr. Gaylin, the psychiatrist most often consulted by the court which itself convicted and sentenced Fielding, stated that "I know of no jail or penitentiary in which [Fielding] could be protected from abuse from fellow prisoners," unless placed in solitary. (59a) Dr. Sadoff similarly noted that persons such as Fielding "are harassed, beaten and literally destroyed" if not isolated. (101a) Dr. Weinstein, who has direct medical responsibility for a New York prison, said that "[t]he dangers of assaults and sexual attacks [on persons such as Fielding]. . . . are ever present." (118a) And Dr. Irving Bieber, director of a nine year study of male homosexuals, noted that prejudice against pedophiliacs tends to be:

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* Ordinarily, of course, this Court will not reverse facts found by the District Court unless the findings are clearly erroneous. However, in cases like this -- where no evidentiary hearing has been held and credibility thus is not a consideration -- this Court has "broader discretion on review." Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2nd Cir. 1972). See also San Filippo v. United Brotherhood of Carpenters & Joiners of America, 525 F.2d 508, 511 (2d Cir. 1975)(on appeal from order denying preliminary injunction, entered on the basis of documentary evidence, "this Court is able to exercise its discretion and review the papers de novo"); Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 516 F.2d 172, 186 (2d Cir. 1975), cert. granted, 96 S. Ct. 1505 (1976); International Controls Corp. v. Vesco, 490 F.2d 1334, 1341 n.6 (2d Cir.), cert. denied sub nom., Vesco & Co., Inc. v. International Controls Corp., 417 U.S. 932 (1974).

> "[D]istributed in higher frequency and qualitatively of greater intensity in the less educated and undeveloped segment of the population. This, of course, would include most prisoners who, paradoxically, are often extremely pseudo-moral and tend to be sadistic to child sexual offenders. This type of attitude constitutes an additional threat to Brian's sanity and integrity if he is imprisoned." (89a) (See also Dr. Bellak's views at 66a)

With no evidence to the contrary, what more was required to show an Eighth Amendment violation?

This society has passed the point where the criminally convicted may simply be locked away, and subjected to whatever horrors traditionally have been associated with prisons. This Court, like federal courts throughout the country, has recognized that an inmate has a right to medical treatment, at least where the absence of treatment "shocks the conscience." E.g., Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974); Martinez v. Mancusi, 443 F.2d 921, 923 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971). See also United States ex rel. Schuster v. Vincent, 524 F.2d 153, 160 (2d Cir. 1975), where this Court, in dicta, wrote that "[p]sychological oppression is as much to be condemned as physical abuse, and. . . acts causing mental suffering can -- even absent attendant bodily pain -- violate the Eighth

Amendment").*

Similarly, an inmate is entitled to protection from physical abuse. Woodhaus v. Commonwealth of Virginia, 487 F.2d 889 (4th Cir. 1973); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), cert. denied sub nom., Employee-Officer John v. Johnson, 414 U.S. 1033 (1973); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976); Van Horn v. Lukhard, 392 F. Supp. 384 (E.D. Va. 1975).

Fielding presently is being subjected to both deprivation of necessary medical treatment and the constant threat of physical harm. In this society, in this day and age, that is cruel and unusual punishment.**

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* As illustrative decisions in other Circuits recognizing a right to treatment, see Finney v. Arkansas Board of Corrections, 505 F.2d 194 (8th Cir. 1974); McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973), reversed on other grounds, 516 F.2d 357 (4th Cir. 1975), cert. dismissed as improvidently granted, 96 S. Ct. 2640 (1976). See also Finney v. Hutto, 410 F. Supp. 251, 258 (E.D. Ark. 1976) and Barnes v. Government of Virgin Islands, 415 F. Supp. 1218, 1227-1228 (D. V.I. 1976), both of which recognize a right to mental health treatment.

** We do not mean to suggest that no measures could be taken which would be sufficient to treat Fielding in prison or to ensure his safety, thus curing the constitutional infirmity of his incarceration. But, as Dr. Gaylin and the other experts stated, New York just has failed to adopt appropriate measures. And we think we need hardly argue that solitary confinement -- traditionally reserved for incorrigible inmates, not for those whom the State cannot protect -- is not an appropriate means of ensuring safety. The unconstitutionality of Fielding's sentence cannot be cured even if the State could "protect" him by sticking him in a closet for up to seven years. [Indeed, the record evidence is to the contrary: isolation would have to be broken periodically, and thus the risk of harm would still be there. (See 59a)].

Nor is it an answer here to say that Fielding's sentence is authorized by state law. For as the Tenth Circuit has stated (in holding that two inmates' allegations concerning a prison beating could not be summarily dismissed):

> "Cruel and unusual punishment may be inflicted by the unconscionable penalty imposed by statute or by the inhumane execution of a permissible penalty under a constitutionally permissible statute...." Bethea v. Crouse, 417 F.2d 504, 507-508 (10th Cir. 1969)(emphasis added).*

See also Downey v. Perini, 518 F.2d 1288 (6th Cir.), judgment vacated on other grounds, 96 S. Ct. 419 (1975); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938, 983 (1974); Roberts v. Collins, 404 F. Supp. 119 (D. Md. 1975), all of which struck down statutorily authorized sentences as unconstitutionally excessive.

CONCLUSION

For the foregoing reasons, we respectfully submit that Fielding's constitutional rights have been violated. The orders of the District Court, to the extent appealed from by Fielding, should be reversed. Fielding's sentence should be vacated and resentencing ordered. Alternatively, this Court

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* Accord: Battle v. Anderson, 376 F. Supp. 402, 422-423 (E.D. Okla. 1974)(holding unconstitutional, on the facts of the case, use of chemical agents, solitary confinement, and denial of medical care).

should direct a prompt evidentiary hearing to permit respondents to attempt to rebut the undisputed record below.

Dated: New York, New York
October 8, 1976

Respectfully submitted,

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ATTORNEY GENERAL